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Prof. Dr. G. Vermeulen - EU Procedural Rights in Criminal Proceedings

Results of the study on EU Procedural Rights in Criminal Proceedings

Prof. Dr. Gert Vermeulen

Justice Forum, Procedural Rights Sub-Group
Brussels, 9 November 2009



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Context and background

- > Follow-up report to the 2005 'Study on Procedural Rights in criminal proceedings: Existing level of safeguards in the European Union' (T. Spronken and M. Attinger), funded by the EC
- > Goal: to obtain up to date information on the level of provision of procedural rights in MS in order to support Commission legal initiative
- > *status questionis* of 4 fundamental rights
 - > A. the right to information
 - > also on other rights than listed below
 - > B. the right to legal advice
 - > C. the right to legal assistance free of charge
 - > D. the right to translation and interpretation of documents
 - > + E. Procedural rights in mutual recognition (MR) instruments



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Research and technical team

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Methodology and structure

- > 1. *analysis* of the 4 fundamental procedural rights in recent case law of the ECtHR
- > 2. *overview* of these rights as guaranteed in the formal legislation of each EU Member State
 - > through extensive on-line questionnaire sent to all 27 EU MS (representatives of the Ministries of Justice)
 - > questionnaire also included questions on implementation of these rights in regard of EAW and other MR instruments
 - > responses received between April and July 2009 from all MS except Malta
- > 3. *conclusions*, based on the answers as provided by MS

Towards EU Minimum Procedural Rights In Criminal Proceedings

*Taru Spronken
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Procedural rights in criminal proceedings have received an increasing amount of attention in the European Union (EU) over the last couple of years and are the central topic of this book.

All EU Member States are party to the European Convention on Human Rights (ECHR), which is the principal treaty setting out the basic standards for suspects' procedural rights in criminal proceedings in the EU. However, divergent practices in different Member States have hitherto hindered mutual trust and confidence, principles put forward by the 1999 Tampere Conclusions, between them. In order to counter this obstacle, the European Commission, in its 2003 Green Paper on "Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the EU", held that the EU is justified in taking action in this field. Member States had also expressed the need and wish for cooperation in the matter on a EU level. However, the ideas in the 2004 Commission "Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union" have not yet sparked any political agreement on the matter.

In 2005, the Commission arranged for a study to be carried out on procedural rights in the EU, in order to comply with the The Hague Programme's call for studies on the existing levels of safeguards in the Member states.

This book contains the results of an EU-wide research project (JLS/2008/D3/002) the authors have conducted as a follow-up report to the 2005 study, providing up to date information on the level of procedural rights in the Member States as a lead for possible new Commission legal initiative on the matter and as a boost for the "Roadmap on Procedural Rights" presented by the 2009 Swedish EU Presidency.


The main procedural rights studied – the right to information, the right to legal advice, the right to legal assistance (partially) free of charge and the right to interpretation and translation – seem to be guaranteed by law more or less in accordance with the ECHR in the criminal justice systems of the EU. However a more in depth look at the implementation of these rights raises doubts as to whether in all Member States everyday practice is in line with the Strasbourg standard. This underlines the need for EU action, probably even beyond this presumed acquis.

Particularly striking is the fact that fundamental rights such as the right to remain silent, to have access to the file and to call and/or examine witnesses or experts, even if deemed basic requirements for a fair trial, are not provided for in legislation in all EU Member States.

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A. Information (1)

- The right to remain silent is no statutory right in 2 MS
- The right to have access to the file is not provided on behalf of the suspect in 4 MS
- Substantial divergence in the way suspects are informed and absence of legal obligations to inform suspects on all four fundamental procedural rights
- In many MS with a right to legal assistance during police interrogation, there are no provisions to secure the effectuation of this right (same applies to information on the right to legal aid)



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A. Information (2)

- > In 2 MS there is no legal obligation to inform the suspect of his right to silence
- > In 6 MS there is no legal obligation to inform the suspect of his right to call and examine witnesses
- > In 10 MS the suspect is informed about (one or more of) his rights by means of a letter of rights, although there are significant differences between these MS as to which rights are included



B. Legal assistance

- > The right to contact a lawyer after arrest exists in most MS, although there is a great divergence as to the moment at which this right can be effected
 - > In some MS this is not possible *immediately* after arrest, unlike required by the ECHR
- > Basic rules of ECtHR case law on access to lawyer are not common practice (cf. Salduz)
 - > In 4 MS the right to consult a lawyer before questioning is not guaranteed
 - > In 5 MS there is no right for the lawyer to be present at police interrogations
 - > Only in 3 MS it is not allowed using a confession made in the absence of the lawyer as evidence in court



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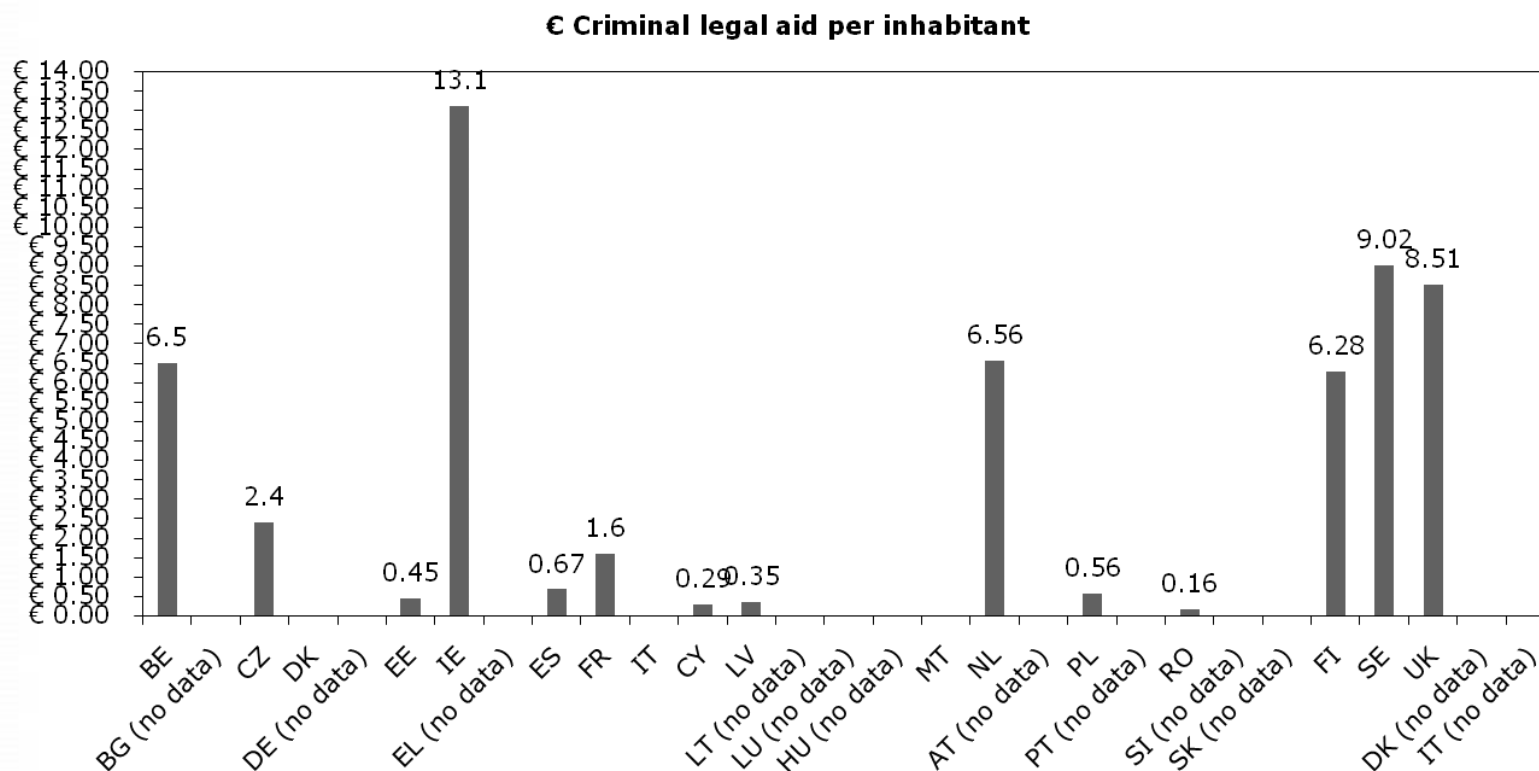
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C. Legal assistance (partially) free of charge

- This right exists in all but one MS (DE), but considerable differences in the implementation of this right
- Wide variety in merits and/or means test
- In small number of MS there is no legal obligation to inform the suspect of this right



Huge differences in financial resources available for legal aid





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Quality of legal assistance (partially) free of charge

- Obligation of State to ensure that legal assistance is effective (monitoring system...)
- In many MS there are no mechanisms to control the quality of legal assistance free of charge
- The special requirements for the lawyer providing legal assistance free of charge are, in many cases, of a general nature and non-specific for providing legal assistance free of charge
- In many MS the specialisation of the lawyer is not taken into account when appointing a lawyer to a case



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D. Interpretation and translation

- > The right to interpretation exists in all MS
- > The right to translation of documents exists in all but 5 MS
- > Great divergence regarding the implementation:
 - > Whether or not there is a legal obligation to be informed on these rights
 - > In 5 MS there is no provision for interpretation at consultation of the suspect with his lawyer
 - > Some MS have no provisions for visually or hearing impaired suspects
 - > Considerable variety as to which documents have to be provided to the suspect and what documents are translated



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E. Procedural rights in MR instruments

- The EAW is treated the most as being equal to the domestic proceedings (e.g. the right to legal advice is applied to EAW proceedings in all MS in the same way as for domestic cases)
- Those MS not applying certain rights with regard to the various MR instruments are often the same
- The great majority of MS apply the right to information on fundamental procedural guarantees to the MR proceedings equally as for domestic proceedings



Overall conclusion

- > The 4 procedural rights that were the subject of the research seem to be guaranteed by law more or less in accordance with the ECHR
- > However, a more in-depth look at the implementation of these rights raises doubts as to whether in all MS everyday practice is in line with the ECtHR standard
 - > which underlines the need for EU action